



Date Issued: **July 7, 2000**

Case No.: **1999-INA-288**

In the Matter of:

CEDAR'S INC. of USA d/b/a/ DUNKIN' DONUTS
Employer,

on behalf of:

TONY EL-HAJJ
Alien.

Appearance: Robert S. Whitehall, Esq.
for Employer and Alien

Certifying Officer: Richard Panati
Philadelphia, PA

Before: Burke, Vittone and Wood
Administrative Law Judges

DECISION AND ORDER

Per Curiam. This case arises from the employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified and available; and (2) the employment of the alien will not adversely affect the wages and

working conditions of United States workers similarly employed.

This decision is based on the record upon which the CO denied certification and the employer's request for review, as contained in the appeal file and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On February 11, 1999, Cedar's Inc. of USA, d/b/a/ Dunkin' Donuts ("Employer") filed an application for alien labor certification to enable Tony El-Hajj ("Alien") to fill the position of Bakery Manager. (AF 30). The job duties for the position are:

Directs and coordinates activities involved with production, sale (including to the general public), and distribution of bagels and donuts. Determines variety and quantity of bakery products to be produced, according to orders and sales projections. Develops budget for bakery operation, utilizing experience and knowledge of current market conditions. Directs sales activities, following standard business practices. Plans and manages product distribution to customers, and negotiates with suppliers to arrange purchase and delivery of bakery supplies. Implements policies to utilize human resources, machines and materials productively. Train subordinates in all phases of bakery activities.

Id. The stated job requirements for the position, as set forth on the application, included a Bachelor's degree in Business or Accounting or one year in the Dunkin' Donuts Training Program. *Id.* One year of experience in the job offered was also required. *Id.*

On March 10, 1999, the CO issued a Notice of Findings ("NOF") proposing to deny certification. (AF 11-13). The CO concluded that the position should be properly classified as Manager, Fast Food Services, (according to the Dictionary of Occupational Titles ("DOT")), because Employer's business is fast food and the position involved managing a fast food outlet. *Id.* The NOF provided two options for rebuttal: The first option involved submitting evidence that the experience requirement arises from a business necessity. Rebuttal evidence must include:

(a) documentation from **Dunkin' Donuts** franchise headquarters showing that the requirements are minimum job requirements established within the franchise for managerial positions nationwide; and

(b) information showing that **Dunkin' Donuts** employees who had less than the minimum job requirements required were unable to perform the duties of the position; and

(c) proof that the job as currently described existed before the alien was hired. Documentation for this requirement was to include: position descriptions, organizational charts, payroll records, résumés of former incumbents, and copies of job advertisements for other managerial positions placed in the last three years.

Id.

The CO informed Employer that its rebuttal must establish that the position and its present requirements existed before the alien was hired. If the job or requirements did not exist prior to the hiring of the alien, then Employer was to document that a major change in its business operation caused the job to be created after the alien was hired. *Id.*

In the alternative, Employer was to reduce the requirements to the DOT standard.¹ *Id.*

Employer's rebuttal, submitted through counsel, was dated May 7, 1999. (AF 7-10). Employer contended that while it is a donut franchise, it is a substantial business and employs approximately 19 individuals. *Id.* The rebuttal also explained that while the franchise agreement requires a manager to have Dunkin' Donuts University training, the franchisee is an independent entrepreneur for staffing and training purposes and there were no other requirements in the franchise agreement regarding the qualifications one must have to competently manage a Dunkin' Donuts franchise. *Id.* Additionally, enclosed were advertisements from other fast food restaurant chains that required a college or university degree of a manager. *Id.*

The CO issued a Final Determination ("FD") denying certification on June 7, 1999. (AF 4-6). The CO found that Employer's rebuttal failed to satisfactorily rebut the NOF. The CO indicated that the franchise agreement submitted did not require that managers have a college degree. (AF 6). The CO indicated further that Employer failed to provide evidence that current managers had two years experience when hired, copies of ads placed by Dunkin' Donuts, position descriptions, organization charts, payroll records or any other evidentiary documentation as requested in the NOF. *Id.*

Employer has requested a review of the denial and the record has been submitted to the Board of Alien Labor Certification Appeals ("Board") for such purpose.

DISCUSSION

It is well established that the DOT is a flexible document, and that it should not be applied mechanically. *See Lev Timashpolsky*, 1995-INA-33 (Oct. 3, 1996); *Promex Corp.*, 1989-INA-331 (Sept. 12, 1990). Here, the CO challenged Employer's classification of the position as a Manager,

¹The NOF went on to describe the procedure for readvertisement if Employer chose to reduce the requirement.

Bakery, which had a higher Specific Vocational Preparation (“SVP”) than that of a Manger, Fast Food Services, which required six months up to and including one year combined education, training and experience. Using the DOT as an “occupational guideline” is necessary as the DOT is unable to list every job opportunity within the United States. *See Chams, Inc.* 1997-INA-40 (Feb. 15, 2000). Thus, the DOT must be utilized in a fashion that supports the intent of the law, and provides a flexible framework which must then be analyzed “in the context of the nature of Employer’s business and the duties of the job itself.” *See Trilectron Indus.*, 1990-INA-188 (Dec. 19, 1991). Consequently, it has been held that the CO may challenge, *inter alia*, the employer’s classification of a particular position. *See Downey Orthopedic Medical Group*, 1997-INA-674 (Mar. 15, 1998)(*en banc*). Employer is then required to provide sufficient evidence to rebut the re-classification. *See Theresa Vasquez*, 1997-INA-531 (July 9, 1998).

In the present case, Employer failed to provide the evidence necessary to rebut the re-classification. In its rebuttal, Employer quoted several opinions asserting the business necessity of requiring a Bachelor’s degree for the position for which labor certification was sought. The CO found in the NOF that these opinions merely stated that some employers prefer to hire manager with Bachelor degrees and there was no evidence submitted indicating that a person without a Bachelor’s degree could not perform the duties described in the ETA 750. We concur with the CO.

While it may be Employer’s preference to hire a manager with a Bachelor’s degree, it has provided no evidence indicating that a Bachelor’s degree is required to perform those duties associated with the position. Furthermore, Employer has failed to submit the evidentiary documentation requested in the NOF. An employer’s failure to produce a relevant and reasonably obtainable document requested by the CO is grounds for the denial of certification. *See STLO Corp.*, 1990-INA-7 (Sept. 9, 1991); *Oconee Center Mental Retardation Services*, 1988-INA-40 (July 5, 1988), especially where the employer does not justify its failure. *Vernon Taylor*, 1989-INA-258 (Mar. 12, 1991).

Additionally, Employer requested an opportunity to amend the application and re-advertise if the CO did not accept its argument. A remand in this instance is not in order. Where an employer does not agree to delete an unduly restrictive job requirement, but offers to amend its application and re-advertise if its arguments are not accepted, the Board has refused to remand. *See GPF Sys., Inc.*, 1994-INA-301 (June 30, 1995); *Lee Int’l Corp.*, 1994-INA-413 (Oct. 12, 1995).

Because Employer has failed to justify the unduly restrictive requirement of requiring a Bachelor’s degree, we find, based upon the information properly submitted to the CO, that the denial of labor certification was proper. Accordingly, the following Order shall enter.

ORDER

The Certifying Officer’s denial of labor certification is hereby **AFFIRMED**.

SO ORDERED.

Entered at the direction of the panel:

TODD R. SMYTH
Secretary to the Board of
Alien Labor Certification Appeals

TRS/jg/ktn

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decision, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002**

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced written pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition, the Board may order briefs.